SUPREME COURT OF THE UNITED STATES

October Term, 1944.

No. .....

UNITED STATES *ex rel.* ROBERT E. LEE JORDAN,
Petitioner,

against

HAROLD L. ICKES, Secretary of the Interior.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Argument.

I.

The Court erred in rendering judgment, in the instant case, without first determining the question of title to the submerged lands off the West Coast of California and the minerals therein, as all the rights claimed by the appellant are based upon the allegation of ownership of the said lands and minerals in the United States Government. The judgment is, therefore, moot.

The United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia, both failed to judicially consider the allegations of the complaint and the facts upon which this action was based.

A reading of the complaint will disclose that all of the rights which are claimed by the appellant are grounded upon the fact that the United States Government is the owner of the submerged lands and the minerals in them, a tract three miles in width and extending along the coast of California. If the facts so alleged were untrue or could not be established, no rights to leases would accrue in favor of the appellant and appellant would not be entitled to any leases on any part of the submerged lands. As the alleged facts of ownership are true, the rights of the appellant would then fall under the provisions of the Oil Land Leasing Act of 1920 as amended, based upon the jurisdiction of the Department of the Interior, which is authorized by law to act as custodian of the public domain. The Department rejected the applications for leases filed by the appellant on the grounds that the submerged lands belong to the State of California and that the Department of the Interior had no jurisdiction over the submerged lands and could

not execute leases. Neither the District Court nor the Court of Appeals noted this fact, in their judgments nor did the Department of the Interior set up this point, *i. e.*, of lack of jurisdiction and the title for the submerged lands not being in the United States, as grounds for their motion for Summary Judgment. It appears that with a direct denial of title in the United States by the appellee, as appears in appellant's brief, appendix (pages 7, 8, 9, 10 and 11) that some decision on the point by the court was necessary for the adjudication of the dispute as to title, and rights under it.

Without the question of title being determined by the courts, the rights of the appellant to leases did not arise. Without jurisdiction in the appellee, the appellee is in no position to reject an application on the grounds of the alleged lack of right of the appellant or the question of the discretion of the Secretary, for without jurisdiction, no discretion could arise or be exercised, nor would the matter be subject to the Declaratory Judgment Act or any other Act, nor would the appellant be entitled to any relief.

With the question of the title unsettled, the question of rights of the appellant to leases, the question of jurisdiction on the part of the appellee and his discretion are immaterial and irrelevant and the judgment of the United States Court of Appeals lacked the essential elements to give it the force of an adjudication.

The allegation advanced by the appellant as to the title of the submerged lands being vested in the United States Government is founded upon the fact that the territory now comprising the State of California was secured from Mexico by conquest, purchase and cession in 1848. The transfer of interest was to the United States Government and not to

California, which at that date did not exist as a political entity. Under the Constitution, Article IV, Sec. III, Congress states:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States and nothing in this Constitution shall be construed as to prejudice any claims of the United States or of any particular State".

When California was admitted into the Union on February 13, 1850, it had no land. Under the Enabling Act, California, under Sec. 3, waived all rights to the disposal of the public land within the limits of the State, which the State had set for itself (Appellant's Brief, App. pages 13-14). In 1852, the United States Government appointed a Commission to determine the land titles in the State of California with particular reference to grants previously made under Mexican and Spanish law. In the Act of March 3, 1851, Vol. IX, U. S. Stat. L. 631, under Sec. 13, thereof, appears the following:

> "* * * and be it further enacted that all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this Act shall be deemed, held and considered as part of the public domain of the United States." (R. 57-58-67-68.)

so that California, as late as 1852, was still without any land, although she had been admitted into the Union as one of the sovereign States, indicating that land was not an essential element of sovereignty and establishing the fact that when California came into the Union upon an equal footing with the 13 original States, the only sovereignty

which California secured was political sovereignty under Sec. IV of Article IV of the Constitution of the United States which provides:

> "The United States shall guarantee to every State in this Union, a Republican form of government, and shall protect each of them against Invasion. And on application of the legislature, or the Executive (when the Legislature cannot be convened) against domestic violence."

California received no land until after the government had completed a survey of the territory embraced within the limits set by California for itself, and then, such land as she received was made under a Congressional grant. U. S. C. A., Title 43, Par. 857, Page 121, provided that California could select 500,000 acres after the land had been surveyed, and the selection was to be made by the Legislature of the State of California. A search of the records of Congress failed to disclose that Congress ever granted to the State of California the submerged lands which the United States acquired from Mexico. The records of the Land Department of the Department of the Interior also disclose that California never made any application for or selected any submerged lands. Copy of the letter dated August 5, 1942 from the Department states:

> "This office, in the past, has not knowingly patented to the State of California any land shown by our records to be tidal or submerged lands and we do not find any record of any application for tide lands as swamp and overflowed lands". (Appellant's Brief—Appendix 16-17.)

Without a grant from Congress or a selection by the State of California, the title could not be vested in the State of California. The Enabling Act carried with it no title to the public land and the admission of California as a State upon equal footing with the 13 original colonies

gave it only political sovereignty. (Appellant's Brief 12-13.) It is, therefore, apparent that California has no claim to the submerged lands and that there was no authority for the finding by the Secretary of the Department of the Interior that California did have title and that the appellee was without jurisdiction of the submerged lands, and the judgment of the Court without determining the question of title is valueless.

It has been the policy of the United States from its founding to reserve to itself the minerals which are in the public domain and our Courts have held that the mineral rights formerly possessed by the Spanish and Mexican Governments were retained by our government. This policy has been upheld in the cases of Gorman Min. Co. vs. Alexander, 51 N. W. 346 and in the case of Ivanhoe Min. Co. vs. Keystone Consol. Min. Co., 102 U. S.; 167, where it was held:

> "Mineral lands are, by the settled policy of the government, excluded from all grants; therefore, the grant of the 16 and 36 sections of public lands to the State of California for school purposes made by the Act of March 3, 1853, 10 Stat. L. 244, was not intended to cover mineral lands."

In the recent case of the Great Northern Railway vs. U. S. (Feb. 2, 1942) Justice Murphy stated:

> "Nothing passes but what is conveyed in clear and explicit language. Any ambiguity in a grant is to be resolved in favor of the sovereign grantor, 32 Fed. Sup. 562"

and in the case of McDonald vs. U. S., 119 Fed. 821, 825 it is stated:

> "No act passed shall be construed as to embrace mineral lands which in all cases should be and are reserved exclusively to the United States. Every grant of public land should be taken as reserving and exclud-

ing mineral lands in the absence of an expressed provision to include them. Nothing passes by implication."

It is to be noted that under the decisions of the Courts, even were it held that the title to submerged land was not in the United States Government, that no grant of land to California by Congress included with it, the mineral rights or minerals and that the jurisdiction of the minerals would still lie with the Department of the Interior, and that the denial of jurisdiction by the Department of Interior, as a legal proposition, that the title to the submerged lands was in the State of California, would still leave in the Department of the Interior the right to grant leases for oil and gas in the submerged land, it not having been conveyed to California.

Congress by the Act of March 3, 1853, 10 Stat. L. 246, exempted from sale all mineral lands found within the public lands open for sale in the State of California. By the Act of July 4, 1866, 14 Stat. L. 86, Congress provided in all cases that land valuable for minerals shall be reserved from sale except as otherwise expressly directed by law. This meant that there could be no disposition of mineral deposits except under the authority of an Act of Congress. It is to be noted that there could be no decision under the action of the appellee without a consideration of the matter of ownership of the minerals and that the courts failed to take into consideration this point, and that a decision which does not consider the basis of the action is of no avail.

In the case of Wilcox vs. Jackson, 10 U. S. 264, it was held:

"Whenever the question in any Court, State or Federal, is whether a title to land which was once the

property to the United States has passed, that question must be solved by the laws of the United States."

Bagnell vs. Broderick, 10 U. S. 235.

Parkinson vs. Bracken, 39 Amer. Decisions 296.

It was also held by the California Courts in the case of Moore vs. Small, 17 Cal. 199, at pages 218 and 219, Chief Justice Field speaking for the Supreme Court of the State of California said:

"To the existence of this political authority of the state—this qualified sovereignty, or to any part of it —the ownership of the minerals of gold and silver found within her limits is in no way essential. The minerals do not differ from the great mass of property, the ownership of which may be in the United States, or in individuals, without affecting in any respect the political jurisdiction of the States. They may be acquired by the State, as any other property may be, but when thus acquired she will hold them in the same manner that individual proprietors hold their property, and by the same right: by the right of ownership, and not by the right of sovereignty."

In the case of Hicks vs. Bell, 3 Cal. 227, it was held:

"The only manner in which the right, title, or interest of the United States in or to any of the public lands can pass to or rest in any private person is by means of an act of Congress directly making the grant, or authorizing the grant in their behalf to be made by some person or officers. No title will accrue to any person against the General Government by prescription, by adverse possession, or by estoppel *in pais*."

In the case of Doran vs. Central Pacific Railway Co., 24 Cal. 245, at pages 256 and 257, it was decisively held:

"It is scarcely necessary to say that the policy, the encouragement, the license, or even the grant of this State, cannot confer upon any person any right in the lands of the United States. The General Government does not hold its lands as a mere private proprietor, but its control and power of alienation and disposition

of its lands are uncontrolled, save by the Constitution of the United States alone."

With the foregoing facts at issue, which failed to receive the attention of the Court, Appellant asserts there has been no adjudication, as the vital material facts were ignored.

II.

The Court erred in failing to find that the Oil Land Leasing Act of 1920 as amended does not authorize the Secretary of the Interior to make a legal decision with respect to the title of the submerged lands off the West Coast of California and the ownership of minerals within them.

The making of legal decisions by the Secretary of the Interior has always been subject to review by the courts. The provisions of the Oil Land Leasing Act of 1920 as amended, U. S. C. Title 30, Section 181 *et seq.* does not disclose that any authority under this Act was granted to the Secretary other than the right to make rules and regulations to effectuate the Act and this provision is set out in Section 189.

The ruling cases which determined the rule of law with respect to the power of the Secretary of the Interior to decide legal questions appear in the record on pages 70 and 71 and in appellant's brief, pages 33 and 34. In the case of the U. S. vs. Standard Oil Company, 20 Fed. Sup. 427, it was held that

"Errors of the Land Department in applying law to particular facts are reviewable."

In the case of Sousa vs. Periera, 132 California 77; 64 P. 90, it was held:

> "Where the question as to whether the government had title to land which it could pass * * * was purely a question of law arising on indisputable facts, the decision of the Land Department is not binding on the court"

and in the case of Black vs. Jackson, 177 U. S. 349, it was held:

> "If parties are injuriously affected by action of the Land Department based on an erroneous view of the law, the courts have power in some form to protect their rights against illegal action."

and in the case of West vs. Standard Oil, 278 U. S. 200, it was held that the Land Department had no right to determine a judicial question. The following citations also support the proposition that legal decisions made by the Land Department are subject to review and not binding upon the courts.

Wyoming vs. U. S., 65 L. Ed. 748, 749, 751;

Steel vs. St. Louis Smelting and Railway Co., 106 U. S. 447;

Quimby vs. Colan, 104 U. S. 420;

Wisconsin Central Ry. Co. vs. Forsythe, 159 U. S. 46;

Southern Railway Co. vs. Wiggs, 154 U. S. 269;

Hoyt vs. Weyerhaeuser, 219 U. S. 380.

There is, therefore, no justification for the upholding by the Court of Appeals of the decision of the Department of the Interior to the effect that the title to the submerged land was vested in California and not within the jurisdiction of the Secretary of the Interior to grant leases for the development of oil and gas. This, together with the fact that the Act itself grants to the Secretary of the Interior no judicial powers, makes the finding of the U. S. Court of Appeals without force.

III.

The Court erred in holding that appellant acquired no legal rights under the law to acquire leases by reason of compliance with the Oil Land Lease Act of 1920 as amended and the regulations of the Department of the Interior as set out in Circular 1386.

The basis upon which the District Court and the Court of Appeals held that the appellant was without right or interest in the submerged lands upon which the appellant had filed applications for leases was founded upon the decision in the case of U. S. *ex rel.* McLennan vs. Wilbur, 283 U. S. 414, in which the Supreme Court held that "a permit to prospect for oil or gas was issuable only upon the discretion of the Secretary of the Interior and that a mandamus cannot be made to serve the purpose of an ordinary act but will issue to compel action by a public officer where the duty to be performed is ministerial and the obligation to act peremptory and plainly defined."

The question in that case was the withdrawal of certain lands from further leasing under an expressed policy of the President, holding that the President had the right to withdraw public lands from private appropriation.

The court held on page 419 that under—

> "The Act of 1920, the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior and the application may be granted or denied either in part or in its entirety as the facts may be deemed to warrant".

This particular clause was a part of the rules and regulations issued by the Department of the Interior, being their Circular No. 672 and was issued as a part of the rules of the Department for the Act of 1920. This case was de-

cided on May 18, 1931. After the Act was amended in 1935 new rules and regulations had to be issued conformable to the amendment of the 1920 Act. By virtue of the change in Sections 13 and 17 of the amendment, the provision above cited under Circular 672 was omitted from the new regulations 1386, a copy of which is filed in the record. Therefore, the holding of the Supreme Court in this case would be of no effect as ruling, when the regulations of the Department of the Interior had been changed, and this self-asserted authority of discretion eliminated. This particular clause was the one upon which the court made its finding. The court went on further to state, that there was a difference between applicants for mere privileges and those persons who because of expenditures or otherwise, deserve special consideration. There is no such difference, in the Oil Land Leasing Act of 1920, as amended, which distinguishes between any classes of applicants under the Act. The court cites no authority upon this theory of privilege as it relates to applications for leases and there is no authority in the Act for the deduction stated by the court in its decision.

The fact remains that the government by the terms of the Act offers to every American citizen *a right to a lease* of lands either known to contain oil or other minerals or on land not known to contain them, upon certain specified terms and conditions. Congress has provided the same contractual relation between the government and the citizens, relative to mining, oil leases and homesteads, for the purpose of acquiring an equity or an interest in the public domain of the United States. The miner has only to stake out his claim and to pay the fee required for its registration and such other expenses as are attendant thereto. Immediately upon the registering of his claim the law has

given him an equitable interest in the claim which he can sell or assign. In other words, by following the provisions of the law he becomes to all intents and purposes the owner of the land embraced in his application, and, upon further compliance with the law the Government will eventually give him the patent. The same right to a vested interest is acquired by the homesteader who, by full compliance with the law and subsequent tenure acquires a vested interest in the land. Upon what theory of the law is it possible to differentiate between the cases of the miner and the homesteader and the lessee for a lease to drill for oil. In the latter case the Government has stated the terms upon which it will lease the land and the Department of the Interior has issued its regulations. The oil man files his application, pays his registration fees and there is nothing further that he can do to secure his lease. He has complied in all respects with the law and the regulations of the Department of the Interior and there is nothing left to be done by him. What difference is there as to the creation of a legal right in the three cases cited above by which it can be asserted that in two cases a legal right arises upon compliance with the law and in the third case, no such right is created. The further suggestion that an applicant might have a greater right if he had expended some money or done some work is likewise fallacious and inapplicable, as the law makes no provision for preliminary work to be done or more than the payment of the fees which are provided for in the Act.

The Act specifically provided in Section 181 that the land "*shall* be subject to disposition". It does not state that it *may* be subject to disposition at the discretion of the Secretary. It is a direct offer of the land "in the form and manner provided" and the manner and form has been pre-

scribed by Congress and any applicant who complies with these requirements fulfills the letter of the law and acquires a right.

The direction of Congress as to how the land shall be disposed of appears under Sections 13 and 17 of the amended Act of 1935. Where the original Act of 1920 provided that the Secretary of the Interior was *authorized* to execute leases upon the terms provided under the law, the amended Act of 1935 added in Section 13 "*and directed*" and specified a certain class of applications which must be granted leases. Sec. 17 provided two methods for the leasing of oil land to be followed by the Secretary. If the land is known to contain oil, he may lease it to the highest bidder by competitive bidding and if it is not known to contain oil he may lease it without competitive bidding, and the person who first files upon the land, is given a preferential right to the lease by virtue thereof. It is apparent from the law itself that the Secretary of the Interior is directed under Sec. 17 equally as under Sec. 13 as to the procedure to take with respect to land of known or unknown oil or mineral deposits, and that he has no other recourse then to lease it by competitive bidding if it is known to contain oil and to lease it without competitive bidding if it is not known to contain oil. One who has complied fully with the regulations has acquired a right and an interest which has been sustained by the courts for years past. In the case of Krushnic vs. Secretary, 30 Fed. (2d)

> "a person who complies with all the requisites necessary to entitle him to a patent for a particular lot or tract is to be regarded as the equitable owner thereof."

The law has held that a right is created by virtue of a selection of land, and has granted injunctive relief to enjoin, the Secretary from rejecting the selection.

Work v. Read, 10 Fed. (2) 637, 640.

In the case of Payne vs. Central Pacific Ry. Co., 255 U. S. 228, 237 the court held that where "nothing remained to be done by the grantee or its successor to fill the conditions of the grant and perfect the right to a patent," was entitled to a patent, and further held:

> "* * * the rule applicable in such a situation is that a person who complies with all the requirements necessary to entitle him to a patent is to be regarded as the equitable owner thereof,"

and,

> "* * * rightfully speaking, the selection is not to be likened to the initial step of one who wishes to obtain the title to public land by future compliance with the law, but rather to the concluding step, by one, who by full compliance, has earned the right to receive the title."

Deffenbock vs. Hawke, 115 U. S. 392;

Ballinger vs. U. S. Frost, 216 U. S. 240, 248;

Levi vs. Thompson, 45 U. S. 17, St. Paul and S. C. R. Co. vs. Winona and St. Paul R. Co., 112 U. S. 720;

Wyoming vs. U. S., 255 U. S. 490, 65 L. Ed. 743, 748, 751.

Decisions of the Interior Department, Vol. 57, page 153.

For the court to hold that a dicta decision asserting a right under the law to be a privilege only, and citing no authorities in support thereof and contrary to the provisions of the law and the holdings of the Supreme Court makes the decision of the Court of Appeals invalid and lacking the force of an adjudication.

The appellant acquired by virtue of his compliance with the law the same rights as those of the miner and homesteader and this right cannot be denied him under the terms of the Act.

IV.

The Court erred in holding in effect that the discretion of the Secretary of the Interior was of greater authority than the Acts of Congress.

The finding of the Court of Appeals on the point of the discretion of the Secretary is not on all fours with the decisions of the court with reference to matters arising in the Department of the Interior.

Basing their decision upon the case of McLennan vs. Wilbur *(supra)* it was shown that that decision was based upon a paragraph in the rules and regulations issued by the Secretary under the 1920 Act and the Supreme Court accepted the arrogation of authority by the Secretary and decided accordingly. That decision, however, is now invalid. The new Regulation 1386, does not contain the clause which appeared in Circular 672. (appellant's appendix, page 15.) The question of public policy which arose in the McLennan case is not present in the instant case and the granting of leases under the Oil Land Leasing Act cannot well be termed a public bounty in view of the substantial royalties, which each producer of oil under a government lease, is required to pay to the government.

Attention is further directed to the two other cases known as Dunn vs. Ickes, 115 Fed. (2d) 36 and the Roughton vs. Ickes, 101 Fed. (2d) 248, 251. Both of these cases were decided by the Court of Appeals and under ordinary circumstances there would be a certain hesitancy for this court to reverse itself, notwithstanding the fact that in both of the cited cases the question of discretion did not arise, as an essential adjunct to the decision.

It is well to consider just what discretion is actually given to the Secretary of the Interior under the Oil Land

Leasing Act. This authority is contained in U. S. C. Title 30, Sec. 189 where it states:

> "The Secretary of the Interior is authorized to prescribe the necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of Sec. 181."

Sec. 181 is that Section which provides that the public land "*Shall be subject to disposal*" to "*citizens of the U. S.*" upon compliance wth the law and the regulations which may be issued to effectuate the law. Attention should be directed to the fact that Section 189 provides that the Secretary is to do any and all things necessary to carry out and accomplish the purposes of the Act. This means that his regulations are to be drawn for the purpose of enabling people to secure leases and to develop the public domain under the terms of the law. It does not state that the Secretary has any authority to make any legal decisions or interpret the law, but it does direct him to take all steps necessary to effectuate the Act. How it is possible, under the grant of authority given to the Secretary in Section 189, to inject the idea of a discretion, which is of such power and authority as will nullify the Act and override Congress? When the Secretary, however, goes out of his way to try to prevent the leasing of land and refuses to act upon appeals for a period of more than seven years, it appears that instead of carrying out the provisions of the Act, and his duties under it that he is acting in reverse and is seeking to prevent the leasing of the public domain and is guilty of malfeasance.

I believe the ruling case with reference to the discretion of the Secretary may be found in Daniels vs. Wagner, 237 U. S. 547 in which Mr. Justice White said:

> "That in a case where, under an act of Congress, a right is conferred to make an application to enter public land, and a duty imposed upon the Department

to permit the entry, the Department is authorized in its discretion to refuse to allow that to be done which is commanded to be done, and thus deprive the individual of the right which the law gives him. And it becomes, moreover, certain that the necessary result of this assertion is the following: That although Congress may have the power to provide for the disposition of the public domain and fix the terms and conditions upon which the people may enjoy the right to purchase, it has not done so, since every command which it has expressed on this subject may be disregarded, and every right which it has conferred on the citizen may be taken away by an unlimited and undefined discretion which is vested by law in the administrative officers appointed for the purpose of giving effect to the law. When the true character of the proposition is thus fixed it becomes unnecessary to go further to demonstrate its want of foundation. * * *: That the commission of a wrong by the officers of the Department in disobeying the act of Congress and in denying to an individual a right expressly conferred upon him by law would become the generating source of a discretionary power to make the disobedience of law lawful and the taking away of the right of an individual, legal."

The same position was taken in the case of Work vs. Read, 10 Fed. (2d) 637, 670 "in the absence of legal obstacles the first entryman acquires a prior right which is not within the discretion of the Secretary to ignore—the law fixes their duty."

It is the established rule that even where there may be, under the law, a discretion placed in an executive officer of the government, that while the discretion cannot be controlled, at the same time, the courts will grant relief by requiring the person in whom discretion is placed to act.

"Courts may not determine how administrative tribunal shall act but may compel such a body to act".

Delaware & Hudson Ry. Corp. *et al.* vs. Williams, *et al.*, 129 Fed. (2d) 11, 16, 17.

U. S. vs. McAllister Edwards Coal Co., 277 Fed. 573.

Re Press Printers & Publishers, 12 Fed. (2d) 660.

In the case of Work vs. Reeves, 276 U. S. 175—

"* * * mandamus lies where Secretary of the Interior refuses to act on the assumption that he has no jurisdiction".

Hadley vs. Huidekoper, 225 U. S. 736.

The question of the discretion of the Secretary and its limitations is fully and soundly treated in the very recent case of Arenus v. U. S., 64 S. Ct. 1090 and the doctrine enunciated is particularly in point in the instant case, supporting the contentions of the appellant. Reference is also made to the case of Work v. Read, 10 F. (2) 637, 640 which is also applicable to the instant case.

Under the ruling decisions with reference to discretion the Secretary is compelled to act, even if there is a legal justification for the assertion of the discretion. There is nothing, however, in the Oil Land Leasing Act of 1920, as amended, which grants the Secretary the discretion claimed and even if such discretion was in the Secretary, that discretion canot be arbitrary or capricious and be exercised by refusing to pass upon appeals, for a period of more than seven years. The Courts have full authority to compel the Secretary to act. The facts demand a mandate by the Court for relief.

V.

The Court erred in failing to find that the continued inaction of the Secretary of the Department of the Interior, to pass upon the appeals of the appellant for a period of more than seven years, was and is arbitrary and capricious and that the affidavit filed by the appellee in support of its motion for summary judgment was not made in good faith.

It is only necessary to refer to the record, which shows that the appellant appealed from the decision of the General Land Office on August 6, 1937 to establish the fact of the unjustifiable action of the Secretary (Record, page 3). To follow through the conduct of the appellee from that date forward is a story of dilatoriness and bad faith. It was represented to the appellant that the question as to the title to the submerged lands off the West Coast of California and the minerals in them was being referred to the Department of Justice for an opinion. On December 26, 1940 Francis Biddle, then Solicitor General, wrote to appellant—

> "* * * the President has recently sent me your letter of November 5th with respect to submerged oil deposits.
>
> We have made a careful study of the best way to assert the government's claim to these deposits. Probably our case would be strengthened by the enactment of a law asserting the government's title to the deposit. This is now under consideration. Please treat this letter confidentially".

The fact is clear that at the time the letter was written that the Department of Justice had concluded its studies regarding the question of submerged oil deposits and was prepared to give an opinion on the matter to the Secretary of the Interior. For some reason not apparent, that opin-

ion has not been requested and is probably still ready to be given, if requested by the Department of the Interior.

There was a considerable amount of publicity raised at the time hearings were held before both House and Senate Committees regarding the question of the ownership of the submerged lands and minerals. Several articles were published in the Spring of 1942, these articles are attached to the record on pages 44, 45 and contain statements attributed to the Attorney General, Mr. Biddle, stating that the Department of Justice had no intention of proceeding further with the consideration of the question of rights and title of the United States to the submerged lands off the West Coast of California. These interviews were given out by the Attorney General before the letter which Secretary Ickes wrote to Senator King dated April 17, 1942. At that time it was still alleged that the question of title to the submerged lands was still under investigation. A copy of which letter was made a part of the affidavit in support of appellee's motion for Summary Judgment (appellant's appendix, page 20). This letter again asserting that the question of the rights and jurisdiction over the submerged lands was still under consideration by the Department of Justice was in direct contradiction to the public statement made by the Attorney General. From the evidence in the record, it is clear that it was the intention of the appellee to mislead the court as to the facts existing at the time. For, two years previously, the Department of Justice had already made its investigation and for some reason not yet divulged, the whole question has been arbitrarily and capriciously held in abeyance.

On February 23, 1938 Mr. Harry M. Edelstein, Asst. Solicitor to the Department of the Interior testified before a House Committee that the question of title to the sub-

merged lands ought to be decided by the Supreme Court of the United States, as the Interior Department was not sure its decision regarding title to submerged land and minerals was correct (Record, pages 94 to 99). At a subsequent date the Attorney General appearing before the Committee of Appropriations, 77th Congress, with reference to the Appropriation Bill for 1942 stated as follows:

> "The question has never been satisfactorily settled as to which government owns title to the land between low and high water and within the three mile limit and beyond the three mile limit. I think the State, Municipal, the Government, and the private interests who are leasing oil and are otherwise interested in this proposition would all like to have that question distinctly and permanently settled" (Record, pages 72 and 86). (Appellant's Brief, page 36.)

With the statements of a representative of the Department of the Interior and of the Attorney General both expressing a wish that the question of title to the submerged lands and ownership of minerals be settled, they have proceeded by motion for summary judgment to prevent such a decision.

The interesting point which the Court of Appeals failed to note was that the minerals had never been granted to California, and that under the Oil Land Leasing Act, were then under the jurisdiction of the Secretary and that without determining title to the submerged lands, the appellee still had the jurisdiction to issue leases for the mineral deposits which were in the submerged lands. It is to be noted that this question is likewise avoided by the appellee and that they have limited their legal defense to the question of title to the submerged lands only.

Notwithstanding the fact that the appellee has jurisdiction over the minerals in the submerged lands off the West Coast of California, he has failed to act upon the appeals of

the appellant for a period of more than 7 years, and appellant's prayer for relief from this inaction is fully justified, in the interests of the United States Government which is losing the oil and the royalties which it would receive from leases, the appellant is losing his right under the law to develop the locations upon which he has filed, while trespassers are draining the oil from his locations and neither the Government or appellant are beneficiaries.

It is doubtful if there is a more flagrant abuse of an alleged discretionary authority than the present case.

VI.

The Court erred in sustaining appellee's motion for summary judgment when the question of title to the submerged lands off the West Coast of California and the ownership of the minerals therein, which are material issues were undetermined.

The circumstances under which a Summary Judgment may be rendered are explained in Rule 56, c. of the Federal Rules of Civil Procedure.

They provide that if the pleadings, depositions and admissions on file, together with the affidavits show that there is no genuine issue as to any material fact the moving party is entitled to judgment as a matter of law. There is, however, no rule for determining whether a genuine issue of fact exists in a particular case, and the decision of a judge or judges does not establish beyond the peradventure of a doubt that an issue of fact does or does not exist, and judges are not infallible.

The appellant, in the instant case, is unable to comprehend how any judge or judges, who had read the record of

this case, could come to a conclusion that there was no genuine issue of material facts presented. The question resolves itself into what are the material issue in this case, and if there is any dispute about them.

First: There is an appeal from a decision of the Land Department of the Department of the Interior which has decided that the submerged land of the West Coast of California is owned by the State of California and title was acquired under the Enabling Act admitting California to Statehood. The petition of appellant, denies this, and presents proof that the title to the submerged lands rest in the United States Government. Is it not material to the jurisdiction of the Department of Interior that it be determined just where the ownership of these lands lie. Can it be truthfully asserted, that jurisdiction in the Interior Department is not controlled by the fact of ownership? Does this fact fail to raise an issue of fact which is material to the right to lease the land? and to govern appellant's rights to leases?

The fact that minerals (oil and gas) were reserved from all grants to California and the further fact that no submerged lands were ever granted California and none selected by the State, must raise the question of fact as to the jurisdiction of the Department of Interior over mineral deposits in that State, and affect the right of appellant to secure leases for discovery and development of oil and gas. Can it be said this question is not material and that no question of fact is involved?

Does not the fact that the Secretary of the Interior has by his inaction for seven years on the appeals of appellant from the decision of the Land Department, raise any material issue of fact as to the arbitrary conduct of the

Secretary and to the denial of the rights of appellant under the law to relief?

Does not the finding by the Court with reference to the discretion of the Secretary based upon Rules of the Department of Interior, which had been superceded by later regulations, call for the attention of a superior authority to correct the error, raise a material issue of fact?

What, under the pleadings, affidavits and the record in the instant case, could sustain an opinion to the effect that there is no genuine issue as to any material fact, where every fact material to the issue is in dispute?

Do not the admissions of Harry M. Edelstein Asst. Solicitor, of the Department of Interior, that the Department was unsure that its decisions on the question of the title to the submerged land being in California was correct. That the subject was under investigation by the Department of Justice and still undetermined, that it was desired that the Supreme Court settle the question of title, raise questions of material fact. When the movant for a Summary Judgment sets forth the foregoing questions. (Appellant's Record 82.) How can it be held, by any court, that there are no genuine issues of material fact.

A motion for summary judgment cannot be granted if any material questions of fact are at issue or appellant entitled to any form of relief.

Clair vs. Sears Roebuck, 34 Fed. Supp. 559.

"Summary judgment is a drastic remedy and never warranted except on clear showing that no genuine issue as to any material fact remains for trial."

Schultz vs. Mfg. & Traders Trust Co., 1 F. R. D. 451;

Fleming vs. Phipps, 35 Fed. Supp. 627;

Granite Trust Bldg. Corp. vs. Great Atlantic & Pac. Tea Co., 36 Fed. Supp. 27;
Reiser vs. McKee Glass Co., 1 F. R. D. 170;
U. S. vs. Charles, 1 F. R. D. 121.

VII.

The Court erred in holding that the cases cited are controlling, in point of law, in the instant case.

The case of McLennan vs. Wilbur, 283 U. S. 414, which is relied upon by the court to sustain the Motion for Summary Judgment, is cited as controlling on the grounds first, that the appellee has discretion to accept or reject applications for lease as he may see fit, and secondly that an applicant acquires no rights by virtue of applying for leases, that the filing of an application for a lease is only a privilege.

This case was one involving an application for a lease upon a part of the public domain which, subsequently to the filing of the application, was withdrawn by the appellee, without a proclamation of the President, and the applicant sought to force the granting of a lease by an action in mandamus.

The primary question was whether the appellee had the right to withdraw the land, after it had been filed upon, without complying with the accepted practice, that only the President, by proclamation could withdraw the land.

The decision with respect to discretion of the appellee is grounded upon a paragraph of Circular #672 of the Regulations of the Department of Interior covering the leasing of land for the development of oil and gas, under the Oil Land Leasing Act of 1920. This paragraph is as follows,

> "It should be understood that under the Act, the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety, as the facts may be deemed to warrant."

and is quoted in full in the decision. It must be pointed out that with the amendment of the Act in 1935, the regulations had to be revised to conform to the amended Act. The changes in the Act prevented the reassertion of the claim to discretion as set out in the quoted paragraph. As the amendment provided a direction as to the form and manner in which leases were to be made. This decision was made May 18, 1931 prior to the Amendment of 1935, and was not the law in 1942, and the decision is not in point or controlling since the amendment. An examination of the new Regulations, Circular 1386, issued May 7, 1936, will disclose the absence of the paragraph upon which the decision was based. Under these circumstances the decision on discretion is now invalid and of no effect.

The point that the filing of an application for a lease, confers no right upon an applicant, but only a privilege which is also advanced in the decision, is pure dicta. No authorities were cited by the court in support of this proposition, if any are available, and the theory, is contrary to every decision with respect to rights of citizens in acquiring interests in the public domain. The whole process of the distribution of the public lands are founded upon the laws enacted by Congress, and the rights of the miner, and homesteader are fixed, upon a full compliance with the law. The applicant for a lease is in the same position, and upon compliance with the law acquires the same vested interest.

There is no legal foundation or support in law to the theory of privilege as a denial of a right; nor does it apply in the instant, nor is it good law.

A further examination of this case will disclose that the basic reason for the decision, was to prevent a further increase in the production of oil, which was greatly in excess of current requirements, and that as a matter of public policy, the land should be withdrawn and production restrained. A way had to be found to justify the withdrawal order of the appellee. The idea of discretion and the holding that only a privilege was contemplated, not a right, seems to have supplied the required reasons to uphold the appellee in arrogating to himself the powers of the president, in withdrawing the land, without Presidential Proclamation.

It is difficult to see any analogy between the case cited and the instant one, or find any legal principles, which can be applied to the instant case which could be held in point or controlling.

The case of Dunn v. Ickes, 115 F. (2) 36, was concerned with an application for land which had already been patented. The title to the land had already passed out of the United States to the patentee and the Department of Interior had no jurisdiction. The action should have been dismissed on those grounds. However notwithstanding the facts in the case, the court discussed at great length upon the subject of discretion, which did not arise, if the facts are, as given in the report. That part of the decision relating to discretion, was pure dicta, was not pertinent to the issue, and not necessary for the decision. That part of a judgment which is unnecessary for the determination of the questions before the court or germane to the issue cannot be regarded as the law but mere surplusage and dicta.

This case as far as being considered a precedent on the subject of discretion in the Secretary, is valueless, and a decision based upon dicta will not be considered as controlling.

The facts are in no way analogous with the instant case and establishes no rule which can be accepted as controlling law.

Appellee has also cited the Doehler Metal Furniture Co. Inc. vs. Warren, Comptroller General of the U. S. 129 Fed. (2) 43, as a basis for refusal to grant Declaratory relief.

This case arose out of a controversary between plaintiff and the Comptroller, upon a claim for an accounting. The contract provided if plaintiff failed to deliver supplies to the War Department within specified times, the Government could terminate appellant's right to proceed, make substitute purchases and hold appellant liable for excess costs to the Government. The Government accepted a small quantity of supplies and cancelled the contract, purchased the supplies elsewhere and held appellant liable for the excess costs. The appellant took exception to the Government's statement of costs, and sought a declaration, "That the excess costs is the difference between the contract price and the sum actually paid out in completing the same" specifying the amount claimed and an order for the sum.

There was no dispute as to questions of law and no relief by mandamus was asked. Under the Statute the Comptroller had the power to "settle and adjust" all claims in the General Accounting Office.

The Court said "It is not the policy of the Courts to rule on any abstract legal question, whether the relief prayed for is a declaratory judgment or otherwise," and further

"The Declaratory Judgment Act does not increase the jurisdiction of the Federal Court, in the sense that, if a Court has not had power over a certain subject matter or over certain persons, the Act does not give it."

The Court held that by virtue of the statute under which the Comptroller had the power to "settle and adjust all claims of the General Accounting Office" it did not have the power to void the statute by a declaratory judgment, as it did not have such jurisdiction as would nullify the statute, and that the question submitted, did not present the kind of claim upon which any type of judicial relief could be granted. It pointed out that mandamus could issue, as a form of relief but no relief of that nature had been asked, and that the Court did have jurisdiction over the Comptroller to grant that form of relief.

The differences between the foregoing case and the instant case is readily discernible. The jurisdiction of the court is definitely limited by the Statute, and the plaintiff failed to ask for the relief which the court has the power to grant. In the instant case the statute provides the manner and form by which an applicant can secure leases, it directs what shall be done by the appellee. If it can be established that appellee has any discretion, that discretion is to be exercised to the end that the public domain shall be leased for the purpose set out in the act. The duty of the appellee is to make regulations to effectuate the law, not to willfully obstruct its operation or to seek to nullify the law by a claim of power and authority which is contrary to the intent of congress. The Oil Land Leasing Act of 1920 as amended, granted appellee no power or authority to divest the government of title to its public domain, to deny jurisdiction over both land and minerals and thereby seek to find relief from the application of the

supervisory power of the court by asserting a lack of jurisdiction in the Court, which has authority to grant the relief prayed for.

Under the facts in the record of the instant case, the jurisdiction of the court has not been so enlarged as to enable the court to accept the above cited case as being conclusive. The appellant has applied for coercive relief and under the ruling of the above cited case, the court has power to grant it.

This Honorable Court is asked to accept the decision in this cited case upon the following state of facts. An abstract legal proposition to determine a system of accounting, a statute fixing the powers of the comptroller, and no prayer for relief within the power of the court to grant, as analogous and controlling the instant case. Here the question of title to Government land is involved, here the appellee has no statutory power to determine legal questions, the jurisdiction over mineral deposits, which have been reserved by the government, which appellee holds by virtue of law, here a failure to act upon appeals for more than seven and coercive relief to force action, regardless of the discretion he may claim. The Secretary must be forced to decide one way or another. The court has jurisdiction to set aside the illegal finding as to title, to determine the jurisdiction of the mineral land, and the power to require a decision on the appeals. All of this relief is available under the Declaratory Judgment Act, and coercive relief is obtainable under the same act.

The finding in the cited case applies to the set of facts upon which it is based, but is irrelevant and without analogy to the instant case, and the decision cannot be accepted as ruling or controlling.

The case of Perkins v. Lukens Steel Co. is also cited by appellee upon the ground of that paragraph which states: "Power has not been conferred upon Courts to interfere with the performance of ordinary duties of the Executive Departments of the Government," and this has been advanced as a reason for holding the Courts are powerless to grant relief for those dealing with them. This is a case involving the Public Contracts Act of June 30, 1936 whereby sellers must agree to pay employees engaged in producing goods, not less than the minimum wage as determined by the Secretary of Labor to be the prevailing minimum wage for persons employed on similar work.

It is hardly necessary to go further than to state that "ordinary duties" do not fit the actions of the Secretary of Interior in the instant case. It is not the ordinary duty of the Appellee to determine title to land. It is not the ordinary duty of Appellee to deny ownership of land belonging to the Government. It is not the ordinary duty of the Secretary of Interior to deny jurisdiction over mineral deposits reserved by the Government. It is not an ordinary duty to hold up appeals for more than seven years. It is not the ordinary duty of the Secretary to mislead the court by affidavits made in bad faith.

Under no concept of the law could the ruling in this cited case be held applicable, ruling or controlling.

In the case of Ickes v. Underwood, 141 Fed. (2) 546 the decision "turned upon a finding of fact that the deposits of sand and gravel were neither presently or prospectively valuable for mineral use." In the instant case there has been no finding of fact, the only finding was one of law, which is beyond the authority of the Secretary to make, both by the terms of the Oil Land Leasing Act of 1920 as

amended and by the rulings of the courts. In the cited case, "there was a fair hearing with notice and an opportunity to present the circumstances and arguments to the decisive body and an application of the statute, in a just and reasoned manner," quite different from the treatment accorded the appellant in the instant case, whose application for a hearing was refused.

This case proceeds to state under what circumstances judicial restraint may be placed upon executive action as follow,

1. Where an officer insisting that he has the warrant of the statute is transcending its bounds, and thus unlawfully assuming to exercise the power of government.

2. Where an officer attempts to enlarge his power or to usurp power.

3. Where his act is based on a clear mistake of the law.

4. Where an officer has acted or threatened to act in a capricious or arbitrary manner.

The case was in no way similar and any decision on the facts in the cited case would not be ruling or controlling in the instant case.

This case however offers light on the question of the jurisdiction of the courts to control or restrain executive action, and the four (4) points set out, show that the relief by Declaratory judgment is the legal and logical manner in which appellant should proceed.

The case of Roughton v. Ickes, 101 Fed. (2) 546, is similar to the Dunn case *(supra)*. In that case the land had been a part of a government reservation, and had been turned over to an institution for use and the jurisdiction

had passed out of the control of the Department of the Interior, the lease was refused on that ground. The Court in this case as in the Dunn case spent a lot of time on the consideration of the discretion of the appellee. It was pure dicta and not involved in the determination of the action and as such carries no weight as precedent or ruling in the cited case, and cannot be advanced as having any bearing in the instant case.

These are the cases upon which the Court of Appeals rely in support of the judgment in the instant case. These are none of them in point, as the facts and questions raised are based upon entirely different principles of law and may not be advanced as applying to the instant case for those reasons. These cases establish nothing in the way of ruling or controlling law with relation to the instant case, and must be disregarded as being the law.

VIII.

The Court erred in holding that the Declaratory Judgment Act was not applicable in the instant case and that the appellant was not entitled to relief under the said Act.

Under Federal Rule of Civil Procedure No. 57 the courts are fully empowered to act in cases involving the question raised by Appellant's petition and affidavits, and to grant full relief under the Declaratory Judgment Act. The purpose of the Federal Declaratory Judgment Act is to provide a remedy to one of a right, who otherwise could not have his status adjudicated until his adversary took the initiative, and bring about a speedy determination of the controversy.

Sunshine Mining Co. v. Carver, 41 F. Supp. 60.
Pacific Fire Ins. Co. v. Anderson, 42 F. Supp. 917.

The Act was to declare

"* * * rights and other legal relations of any interested party."

Aetna Life Ins. Co. of Hartford v. Hayworth, 300 U. S. 227, 240;

Davis v. American Foundry Equip. Co., 94 F. (2) 441, 492.

The Act provides that where there is an actual controversy and a justiciable question a declaratory judgment as to the rights of the parties involved may be granted.

Revis v. Daugherty, 215 Ky. 823; 287 S. W. 28;

Patterson v. Patterson, 144 Va. 113; 131 S. E. 217;

Moore's Fed. Prac., Vol. III, 1938 Ed. p. 3119, note 19.

"A judgment of the merits may not only declare the jural relation of the parties but should also grant all affirmative relief to which the plaintiff is then entitled."

Moore's Fed. Prac., Vol. III, 1938 Ed., p. 3204.

In the Notes of the Advisory Committee under U. S. C. A. Title 28, p. 718, it is stated that

"A declaratory judgment is appropriate when it will terminate the controversy giving rise to the proceeding. Inasmuch as it often involves only an issue of law on undisputed or relatively undisputed facts, it operates frequently as a summary proceeding."

The idea which the Advisory Committee had with reference to the functions and scope of the declaratory judgment act, is best expressed in their own language

"The existence or non-existence of any right, duty, power, liability, privilege, or disability or of any fact upon which such legal relations depend or a statute, may be declared."

American Macaroni Mfg. Co. v. Niagara Fire Insurance Co., 44 Fed. Supp. 933.

Quoting further:

> "The demand for relief shall state with precision the declaratory judgment desired, to which may be joined a demand for coercive relief, cumulatively or in the alternative."
>
> Hasselbring v. Koepke, 263 Mich. 466; 93 A. L. R. 1170.

It is stated in the case of Gully, Tax Collector v. Interstate Natural Gas Co., 82 F. (2) 145, that

> "When actual controversy exists of which, if coercive relief could be granted, Federal courts may take jurisdiction, under the Federal Declaratory Judgment Act to grant relief of declaration either before or after the stage of relief by coercion has been reached.
> "Pleader can combine in one complaint a request for a declaration and for some coercive relief, the district court can render judgment granting both forms of relief."
>
> Chase Natl. Bk. of City of New York v. Citizens' Gas Co. of Indiana, Ind. 61 S. Ct. 73;
>
> Moore on Fed. Pr., Vo. III—1938 Ed. p. 3222.

The Appellant has applied for coercive relief in the nature of mandamus, to require the Appellee to decide the appeals and to grant the leases applied for. The law and citations with respect to the right to coercive relief are cited on pages 76, 77, 78, 79, 80 and 81 of the Record and in the cases of Wilbur vs. Krushnic, 280 U. S. 306; Cornelius v. Kessel, 128 U. S. 461; Stark v. Starr, 6 Wal. 402; Work v. O'Donnell, 23 Fed. (2) 138; which clearly show the right of the Appellant to coercive relief in the instant case as well as a Declaratory Judgment on the issues raised as to title and jurisdiction.

Respectfully submitted

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